STATE OF MICHIGAN

IN THE SUPREME COURT

KIM SAFFIAN,

Plaintiff/Appellee,

v

ROBERT R. SIMMONS, DDS
Defendant/Appellant.

Supreme Court Case No._____ Gpa 7/7/05
Court of Appeals Case No. 250645
Lower Case No. 01-006896-NH
Cheboygan
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DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

Defendant/Appellant states that jurisdiction is proper under MCR 7.301(A)(2), as Defendant/Appellant seeks leave to appeal the Court of Appeals' decision of July 7, 2005 affirming the trial court's reinstatement of a default against Defendant/Appellant and denial of Defendant/Appellant's Motion for Summary Disposition. This appeal is proper under MCR 7.302(B)(3) and (5) as the issues involve legal principles of major significance to the state's jurisprudence and as the Court of Appeals' decision is clearly erroneous and will cause material injustice and the decision conflicts with decisions by the Supreme Court and other decisions by the Court of Appeals.

STATEMENT OF QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S DENIAL OF DEFENDANT/APPELLANT'S MOTION FOR SUMMARY DISPOSITION WHERE THE TRIAL COURT FOUND PLAINTIFF/APPELLEE'S ACTION HAD BEEN FILED WITH AN INVALID AFFIDAVIT OF MERIT EXECUTED BY AN INDIVIDUAL NOT QUALIFIED TO EXECUTE AN AFFIDAVIT OF MERIT UNDER MCLA 600.2169, WHERE THE TRIAL COURT FOUND THAT PLAINTIFF/APPELLEE'S COUNSEL DID NOT HAVE A REASONABLE BELIEF THE EXPERT WAS QUALIFIED UNDER MCLA 600.2912d(1) AND WHERE PLAINTIFF/APPELLEE'S ACTION WAS NOT COMMENCED AND WAS BARRED BY THE STATUTE OF LIMITATIONS?

Court of Appeal's Answer: NO

Trial Court's Answer: NO

Plaintiff/Appellee's Answer: NO

Defendant/Appellant's Answer: YES

II. DID THE COURT OF APPEALS ERR, AS A MATTER OF LAW, IN AFFIRMING THE TRIAL COURT'S REINSTATEMENT OF A DEFAULT AGAINST DEFENDANT/APPELLANT WHERE PLAINTIFF/APPELLEE'S ACTION HAD NEVER BEEN COMMENCED AS A MATTER OF LAW AND DEFENDANT/APPELLANT HAD NO DUTY TO ANSWER AND THE STATUTE OF LIMITATIONS BARRED PLAINTIFF/APPELLEE'S ACTION BEFORE DEFENDANT/APPELLANT WAS REQUIRED TO ANSWER AND BEFORE THE ORIGINAL DEFAULT WAS ENTERED?

Court of Appeal's Answer: NO

Trial Court's Answer: NO

Plaintiff/Appellee's Answer: NO

Defendant/Appellant's Answer: YES

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This is a dental malpractice case. There is no dispute that this claim is subject to the provisions of MCLA 600.2169, which provides that such an action may only be commenced when a complaint is filed along with a proper and valid affidavit of merit, executed by a qualified expert. There is no dispute in this case that Defendant/Appellant is a general dentist. There is no dispute in this case that Plaintiff/Appellee's cause of action accrued on April 14, 1999. There is no dispute that a Notice of Intent was filed on March 26, 2001 when only 18 days remained before the statute of limitations expired. There is no dispute that Plaintiff/Appellee's Complaint was filed on August 28, 2001, with an Affidavit of Merit executed by Dr. Mark Nearing a specialist in endodontics, and not qualified to execute an affidavit of merit in this case pursuant to MCLA 600.2169 (attached as **Exhibit A.**) It was served on the Defendant on September 7, 2001. It is also undisputed that Plaintiff/Appellee's counsel did not, and could not, have reasonably believed that Dr. Nearing was a properly qualified expert at the time the Complaint was filed, as specifically noted and established by the trial court's Order and Opinion of October 24, 2002 (attached as **Exhibit B.**) The Complaint was served on Defendant/Appellant on September 7, 2001.

As noted above, the occurrence that forms the basis of Plaintiff/Appellee's Complaint occurred on April 14, 1999. On March 26, 2001 Plaintiff/Appellee forwarded a Notice of Intent to Dr. Simmons. At that time, there were 18 days left on the two-year statute of limitations applicable to medical malpractice cases, pursuant to MCLA 600.5805(4). Plaintiff/Appellee's Complaint, with the Affidavit of Merit by endodontic specialist, Dr. Nearing, was filed on August 28, 2001, 154 days later. (Dr. Nearing's Affidavit is attached as **Exhibit A.**) Due to the fact that the Affidavit of Merit was not executed by a general dentist, but instead by Dr. Nearing,

a specialist in endodontics, the statute of limitations again began to run on August 28, 2001. The remaining 18 days elapsed as of September 16, 2001. At that point in time, as the Affidavit of Merit was invalid, a nullity as it was not executed by a qualified person, Plaintiff/Appellee's action was not commenced, the statute of limitations expired, and Plaintiff/Appellee's action against Dr. Simmons was barred as a matter of law before Defendant/Appellant would have been required to answer on September 28, 2001. As a result, Defendant/Appellant would strongly contend that the trial court erred by not granting Defendant/Appellant's motion for summary disposition. The Court of Appeals erred, as a matter of law, in affirming that decision and should be reversed by the Supreme Court. (Appeals Court's Opinion of 7-7-05, attached as **Exhibit C**)

On October 4, 2001, **after** the statute of limitations expired, Plaintiff/Appellee entered a default against Defendant/ Appellant. On January 2, 2002, the trial court set aside the default on motion of Defendant/Appellant, finding excusable neglect for Defendant/Appellant's failure to forward the Summons and Complaint to his insurance carrier. The Court of Appeals subsequently denied Plaintiff/Appellee leave to appeal the trial court's Order.

Defendant/Appellant answered Plaintiff/Appellee's Complaint on January 3, 2002 and, at the same time, stated his Affirmative Defenses, which specifically provided, in Paragraph 7, that Plaintiff/Appellee's Complaint was barred by the provisions of MCL 600.5805 and MCL 600.5838/Statute of Limitations.

Dr. Nearing's deposition was taken on March 5, 2002. (Dr. Nearing's Deposition is attached as **Exhibit D**.) It could not be taken prior to that time given the default. At that time, Defendant/Appellant learned for the first time Dr. Nearing, who had executed the Affidavit of Merit accompanying Plaintiff/Appellee's Complaint, was not a general dentist, but instead, was a specialist in endodontics and, as a result, was not qualified to execute an affidavit of merit

against Defendant/Appellant under the specific and unambiguous terms of MCLA 600.2169(1)(c).

Dr. Nearing testified that his practice is limited to the specialty of endodontics. Dr. Nearing does not practice as a general dentist. He specializes in endodontics. As a result, he is and was not qualified to testify as to the standard of care applicable to Dr. Simmons, a general dentist or sign an affidavit of merit. Specifically, Dr. Nearing testified:

Q And you are a general dentist?
A I'm an endodontist.
Q You are an endodontist?
A Yes, I'm a dental specialist. (Nearing deposition, p. 3, l. 2-5)

* * *

Q All right. So you entered U of M dental school in the fall of '92?
A Yes.
Q All right. When did you complete the U of M dental school?
A 1996 . (Nearing deposition, p. 5, l. 8-13)

* * *

Q And then did you continue some formal education to obtain what you would call a specialist in endodontics?
A Yes. I received a certificate as an endodontist, **as a specialist**, from the University of Michigan in 1998. (Nearing deposition, p. 6, l. 2-5)

* * *

Q Okay. So it's like another year of education at U of M dental school; right?
A It's 2 years. It was 2 years post-grad in a specialty program.
Q Okay. And the specialty program is called what?
A I guess I would say endodontics specialty program. (Nearing deposition, p. 6, l. 12-17)

* * *

Q Okay. So you get some enhanced or some additional license from the State of Michigan?

A Well, a certificate, and I am licensed as a specialist by the State of Michigan, yes. I had to take, you know, there's a—

Q A test?

A Yes. I had to take a test and then you are, you know, then you are certified as a specialist. (Nearing deposition, p. 7, l. 6-13)

* * *

Q All right. And to obtain that additional license in endodontics did you have a written and an oral test or tests that you had to pass or not?

A There was a written and an oral exam, plus submission of cases.

Q All right. And you completed all of that after 2 years and obtained it in '98?

A That's correct... In layman's terms I do root canals, I'm a root canal specialist. Most of what I do, like I tell people, I'm a root canal guy, and I also treat other problems with the roots of the teeth specific to root canals, such as surgery and so on; as distinguished from a periodontist who is more like a gum disease doctor, who also deals with the roots of the teeth obviously, but mine is like from the inside. Endo means inside.

Q All right. What percent of your practice in 1999 and 2000 was within your specialty of endodontics, meaning as a root canal specialist?

A 100 percent. (Nearing deposition, p. 8, l. 22; p. 9, l. 4, 9-20)

* * *

Q Did you practice general dentistry for any period of time after your graduation and prior to your endodontics?

A No, I did not. (Nearing deposition, p. 10, l. 8-11).

Dr. Nearing also testified, at page 41 of his deposition, that he did not have any understanding of what the applicable standard of care for a general dentist would be. It had to be defined by defense counsel. In this regard, Dr. Nearing stated:

Q Do you know or were you given some understanding of what the, quote, magic standard of care is for a dentist in general?

A No, not formally.
Q All right. Do you have an understanding as of now without me telling you what the standard of care would be?
A No. (Nearing deposition, p. 41, l. 13-20).

On March 14, 2002, Defendant/Appellant promptly filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(10), arguing that Plaintiff/Appellee's Complaint had been filed on August 28, 2001, with an invalid Affidavit of Merit, a nullity as a matter of law, and that, as a result, Plaintiff/Appellee's action had not been commenced, the statute of limitations had not been tolled, and expired 18 days later on September 16, 2001.

On May 6, 2002, the trial court entertained arguments on Defendant/Appellant's Motion for Summary Disposition. At that time, Plaintiff/Appellee argued that MCLA 600.2169 was unconstitutional, which argument the trial court rejected. (Trial Court Transcript, 5/6/02, p. 12)

Plaintiff/Appellee's counsel also attempted to argue to the trial court that he reasonably believed that Dr. Nearing met the requirements for an expert witness under MCL 600.2912d(1), which provides that a malpractice action must be filed with a complaint and an affidavit of merit signed by a health professional who the plaintiff/appellee's attorney reasonably believes meets the requirements for an expert witness under MCL 600.2169. However, the trial court subsequently properly noted that Plaintiff/Appellee's counsel could not have reasonably believed that Dr. Nearing met the qualifications to testify against Dr. Simmons, a general dentist, given the fact that counsel was in close contact with Dr. Nearing for a number of months before the Affidavit of Merit was signed in July of 2001, and for further reason that Plaintiff/Appellee's counsel, from approximately February, 2001 on, had copies of Dr. Nearing's records and letterhead which specifically provided that he specialized in endodontics. (Trial Court's Opinion

and Order of 10/24/02, attached as **Exhibit B**.) Having made these findings, the trial court erred as a matter of law in not granting summary disposition to the Defendant/Appellant.

On May 6, 2002, the trial court went on to take the Defendant/Appellant's Motion for Summary Disposition under advisement and entertained the possibility of an evidentiary hearing to determine whether Plaintiff/Appellee's counsel had a reasonable belief that Dr. Nearing was properly qualified to execute the Affidavit of Merit. The parties stipulated to a statement of facts in lieu of an evidentiary hearing.

Following the arguments on Defendant/Appellant's Motion for Summary Disposition, Plaintiff/Appellee filed a Motion to Reinstate the Default the trial court had earlier set aside. On August 26, 2002, the trial court entertained arguments on Plaintiff/Appellee's Motion to Reinstate the Default, along with additional arguments relating to Defendant/Appellant's Motion for Summary Disposition. Defendant/Appellant again argued to the trial court that a medical/dental malpractice action cannot be commenced without a valid affidavit of merit, executed by a properly qualified person, filed along with the complaint. Defendant/Appellant argued strongly that an affidavit of merit, which is executed by a person not qualified to execute the affidavit of merit pursuant to MCLA 600.2169, is not a proper and valid affidavit, is grossly non-conforming, and must in fact, be considered a nullity under MCLA 600.2169. Defendant/Appellant went on to point out that Plaintiff/Appellee's action had not been commenced by the filing of the Complaint, as it was not filed with a valid and proper affidavit of merit, that the action was barred by the statute of limitations, and a default could not be entered against Defendant/Appellant where an action had never been commenced. (Trial Court Transcript, 8/26/02, pp. 7-9)

During the arguments on August 26, 2002, the trial court specifically asked Defendant/Appellant for authority that would establish that entry of a default against a

Defendant/Appellant would not be appropriate if a complaint with a valid affidavit of merit had not been filed before the statute of limitations expired. (Trial Transcript, 8/26/02, pp. 7-8)

Defendant/Appellant subsequently provided the trial court with the citation to *White* v *Busuito*, 230 Mich App 71; 583 NW2d 499 (1998), which established that a default could not be entered against a defendant where a plaintiff had failed to file an affidavit of merit and had not commenced an action, leaving the defendant with no obligation to answer the complaint.

On October 24, 2002, the trial court issued its Opinion and Order (**Exhibit B**). At that time, the trial court specifically found that Dr. Nearing was not qualified to execute an affidavit of merit in this case and that Plaintiff/Appellee's counsel did not have a reasonable belief he was qualified. The trial court went on to find that Plaintiff/Appellee's Complaint had not been filed with a valid affidavit of merit. However, the trial court then erred, as a matter of law, by denying Defendant/Appellant's Motion for Summary Disposition, and instead, reinstating the original default, and setting aside Defendant/Appellant's Answer and Affirmative Defenses.

This matter was ultimately scheduled for jury selection on July 15, 200, and for trial on August 8, 2003.

On June 9, 2003, Defendant/Appellant filed a Motion for Reconsideration, with a brief in support, citing the trial court to cases and authority that had been issued by the Michigan Court of Appeals and the Supreme Court since the trial court's Opinion and Order of October 24, 2002, and which mandated that Defendant/Appellant's Motion for Summary Disposition be reconsidered and granted and that Plaintiff/Appellee's Complaint be dismissed, with prejudice, as the statute of limitations had expired. The trial court denied the Motion for Reconsideration on July 16, 2003, following the jury selection. At that time, the trial court attempted to distinguish *White*, *supra*, by finding that, as Defendant/Appellant was in default, any affirmative

defense was waived, including the statute of limitations. (Trial Court Transcript, 7/15/03, pp. 39-40.) This ignored the statute, MCLA 600.2169, ignored the fact that under this Court's prior decisions, Plaintiff/Appellee's action had never actually been commenced, and ignored the fact that the statute of limitations expired on September 16, 2001, barring the Plaintiff/Appellee's action **before** the default was entered on October 4, 2001.

The parties to this action subsequently agreed to settle the Plaintiff/Appellee's claim, while specifically preserving the Defendant/Appellant's right to appeal the trial court's denial of the Summary Disposition and reinstatement of the Default. On August 12, 2003, a Judgment, in the amount of $18,000.00, was entered subject to Defendant/Appellant's right to appeal, and Defendant/Appellant subsequently paid the amount of the judgment into an escrow fund currently held by Plaintiff/Appellee's counsel, and under an agreement that the proceeds will be distributed to the prevailing party only when the current appeal process has been completed.

The court initially entered a default against Dr. Simmons in this matter on the basis that the Complaint was not timely answered. That occurred because the Defendant/Appellant, through his office manager, Mona Wilson, attempted to fax the Summons and Complaint to Defendant/Appellant's malpractice insurer. It was only later discovered that the attempt to fax the Summons and Complaint was unsuccessful. As a result, the insurer did not have notice of the pendancy of the action until after the default had been entered. At that time, defense counsel entered an Appearance and filed a motion to set aside the default, which the trial court granted.

In an attempt to avoid Defendant/Appellant's Motion for Summary Disposition, Plaintiff/Appellee asked the trial court to reconsider its decision in setting aside the default. The trial court, feeling that it was unfair to have set aside the default for the Defendant/Appellant only to be required by statute to enter a summary disposition in favor of the Defendant/Appellant based on the application of the clear and unambiguous language of MCL 600.2169, granted

Plaintiff/Appellee's motion and used that as an excuse to deny Defendant/Appellant's Motion for Summary Disposition. In doing so, the trial court ignored the simple fact that when an action has not been commenced because a valid affidavit of merit was not filed, the statute is not tolled, and having expired, barred Plaintiff/Appellee's action on September 16, 2001 and a default could not be entered on October 4, 2001 where the action had never been commenced..

Subsequently, Defendant/Appellant filed an Appeal of Right in the Court of Appeals. On July 7, 2005 the Court of Appeals issued a published opinion affirming the trial court's decision. In doing so the Court of Appeals acknowledged that the Plaintiff's Complaint had been filed with an affidavit by Dr. Nearing who was not a properly qualified affiant under MCL 600.2169 and that the trial court had found that Plaintiff/Appellee's counsel did not have a reasonable belief that Dr. Nearing was qualified as a required for filing under MCL 600.2912d(1). The Court of Appeals then went on to state:

> "However, whether Defendant may have been entitled to dismissal on the basis that the affidavit was deficient and did not toll the statute of limitations is not the threshold question in this case. Defendant failed to timely Answer the Complaint, or otherwise defend the action, and the default was entered".

The Court went on to acknowledge that both the Michigan Court of Appeals and Supreme Court have held that a complaint filed with a defective affidavit for purposes of MCL 600.2912d(1) is insufficient to "commence" a medical malpractice action, citing to *Geralds v Munson Healthcare,* 259 Mich App 225, 239-240; 673 NW2d 792 (2003) and *Mouradian v Goldberg*, 256 Mich App 566, 571-575; 664 NW2d 805 (2003). However, the Court of Appeals then went on to ignore the fact that the action had not been "commenced" and the statute of limitations had not been tolled, and attempted to distinguish *Geralds,* and the line of cases following this court's decision in *Scarsella v Pollak,* 461 Mich 547, 607 NW2d 711 (2000), by stating that the instant case does not involve a statute of limitations issue.

The Court of Appeals, on the one hand, acknowledged that the action had not been commenced, but then on the other hand, went on to hold that a default can properly be entered against a defendant who has failed to answer a complaint in an action that has not been commenced and where the statute of limitations expired before the Defendant was required to answer. Defendant/Appellant would argue that decision is clearly erroneous and certainly conflicts with the decisions of this court, and other decisions of the Court of Appeals, as the Court of Appeals in this case itself appeared to acknowledge.

The Court of Appeals also went on to apparently find that the Affidavit of Merit was not grossly nonconforming despite acknowledging that Dr. Nearing was not qualified under the clear and unambiguous language of the statute to execute that Affidavit and also acknowledging that Plaintiff/Appellee's counsel's belief Dr. Nearing was a proper expert was not reasonable in light of stipulated facts which establish that Plaintiff/Appellee's counsel had been in contact with Dr. Nearing for a significant period of time and had investigated both Dr. Simmons' credentials and Dr. Nearing's credentials before filing the lawsuit. In effect, the Court of Appeals' decision, if upheld, would establish that an action can be commenced by the filing of a complaint with an invalid, and grossly nonconforming, affidavit even where plaintiff's counsel knows that the affidavit is nonconforming for purposes of the entry of a default, but at the same time would not be commenced for purposes of tolling the statute of limitations. That ruling is inconsistent on its face, and Defendant/Appellant has filed this Application for Leave to Appeal to the Supreme Court on that basis.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF DEFENDANT/APPELLANT'S MOTION FOR SUMMARY DISPOSITION WHERE IT IS UNDISPUTED, AND THE TRIAL COURT FOUND THAT PLAINTIFF/APPELLEE'S ACTION HAD BEEN FILED WITH AN INVALID AFFIDAVIT OF MERIT EXECUTED BY AN INDIVIDUAL NOT QUALIFIED TO EXECUTE AN AFFIDAVIT OF MERIT AGAINST DEFENDANT/APPELLANT UNDER MCL 600.2169 AND MCL 600.2912d(1), WHERE THE TRIAL COURT FOUND THAT PLAINTIFF/APPELLEE'S COUNSEL DID NOT HAVE A REASONABLE BELIEF THE EXPERT WAS QUALIFIED UNDER THE STATUTES, AND WHERE PLAINTIFF/APPELLEE'S ACTION WAS NOT COMMENCED AND WAS BARRED BY THE STATUE OF LIMITATIONS.

A. STANDARD OF REVIEW

This case involves an appeal from the Court of Appeals' affirmance of the trial court's denial of Defendant/Appellant's Motion for Summary Disposition, which is reviewed de novo. *Perkoviq v Delcor Homes*, 466 Mich 11 (2003); citing *Maiden v Roswood*, 461 Mich 109, 118; 597 NW2d 817 (1999); and *Young v Sellers*, 254 Mich App 447, 449-450; 657 NW2d 555 (2002).

B. DISCUSSION

MCLA 600.2169(1), in pertinent part, states:

> SEC.2169.
> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria: . . .
>
> (c) If the party against whom or on whose behalf the testimony is offered **is a general practitioner**, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the claim of action, devoted a majority of his or her professional time to either or both of the following:

(i) Active clinical practice as a **general practitioner**.

(ii) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf testimony is offered is licensed. (Emphasis added.)

MCLA 600.2169(2) and (3) go on to state:

(2) In determining the qualifications of an expert witness in an action alleging medical malpractice, the court shall, at a minimum, evaluate all of the following:

(a) The education and professional training of the expert witness.
(b) **The area of specialization of the expert witness**.
(c) The length of time the expert witness has been engaged in the active clinical practice or instruction of the health profession or **specialty.**
(d) The relevancy of the expert witness' testimony.

(3) This section does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section. (Emphasis added.)

MCLA 600.2169 was found to be constitutional by the Michigan Supreme Court in *McDougall v Eliuk*, 461 Mich 15; 597 NW2d 148 (1999). In *Scarsella v Pollack*, 232 Mich App 61; 591 NW2d 257 (1998), affirmed 461 547, 607 NW2d 711 (2000), the Michigan Court of Appeals and Supreme Court both found that **a Complaint filed without a proper Affidavit of Merit "is insufficient to commence the lawsuit."** (Emphasis added.)

In this case Dr. Nearing was, and is, not qualified under MCLA 600.2169 to serve as an expert witness against a general dentist, Dr. Simmons. Dr. Nearing does not practice in the field of general dentistry and has never practiced as a general dentist at any time. His practice is limited to the specialty of endodontics. He was not qualified to execute an affidavit of merit to

support Plaintiff/Appellee's Complaint against Dr. Simmons and, therefore, Plaintiff/Appellee's Complaint was filed without an actual affidavit of merit and was insufficient to commence the lawsuit. As a result, the statute of limitations, be it the two years or the six-month statute, bars the Plaintiff/Appellee's claim at this time.

Plaintiff/Appellee "discovered" the existence of her claim against Dr. Simmons no later than December 14, 2000. She subsequently retained counsel who contacted Dr. Nearing to obtain his opinion. Plaintiff/Appellee's Complaint was filed more than six months after Plaintiff/Appellee discovered the existence of her claim, and as a result, the six-month discovery rule does not apply. As previously noted, the two-year statute of limitations elapsed on September 16, 2001 where Plaintiff/Appellee's Complaint was filed without an actual affidavit of merit on August 28, 2001 and was insufficient to commence the lawsuit. Summary disposition should have been granted as a matter of law and Plaintiff/Appellee's Complaint dismissed with prejudice.

In *Holmes v Michigan Capital Medical Center*, 242 Mich App 703; 620 NW2d 319 (2000), the Michigan Court of Appeals cited to *Scarsella, supra.* In the *Holmes*, *supra* case, which decided two separate appeals, the court found that proper affidavits of merit had not been filed because there was nothing on the documents showing that an oath had been taken by the expert. The Court of Appeals in *Holmes*, *supra*, went on to find that as the complaints had been filed with improper affidavits of merit, the action had not commenced, and the statute of limitations had run as to both claims. The court in *Holmes*, *supra*, went on to find that the claims must be dismissed with prejudice, stating:

> "If the claim is time-barred, however, the complaint should be dismissed **with prejudice**. *Holmes*, *supra*, at p. 706, citing to *Scarsella*, *supra*." (Emphasis added.)

Defendant/Appellant would also cite to *Decker v Flood*, 248 Mich App 75; 638 NW2d 163 (2001). In that case, the plaintiff's expert specialized in endodontics. The defendant was a general dentist being sued for allegedly improperly performing a root canal. Those are the same facts as apply in the instant case. The Court of Appeals found that the plaintiff/appellee's expert did not comply with the statute because he was not engaged in the same type of practice (general dentistry) and, as a result, the defendant/appellant was entitled to summary disposition as a matter of law. In so finding, the Court of Appeals in *Decker, supra*, stated:

> "Here, plaintiff's claim that their expert, Dr. Gallagher, meets the qualifications of MCL 600.2169(1) because both defendant and Dr. Gallagher are general practitioners who perform root canals **with the only difference being that Dr. Gallagher limits his practice to root canals.** Plaintiff's argument requires an interpretation of the meaning of the concept 'general practitioner' in the statute. Because this term is not defined in the statute and does not appear to be a technical term, we look to its plain and ordinary meaning. *Western Michigan Board of Control v State*, 455 Mich 531, 539; 565 NW2d 828 (1997). A general practitioner is commonly defined as 'a medical practitioner whose practice is not limited to any specific branch of medicine.' *Random House Webster's College Dictionary* (1997). By contrast, a specialist is defined as 'a medical practitioner who deals only with a particular class of diseases, conditions, patients, etc.' Id.
>
> "It is apparent from plaintiff's admission that Dr. Gallagher 'limits his practice to root canals' that he does not meet the definition of a general practitioner and is, in fact, a specialist. Further, it was undisputed that Dr. Gallagher is an endodontist, which is defined as 'one who **specializes** in the practice of endodontics'. *Stedman's Medical Dictionary (26th edition).*" (Emphasis added).
>
> . . .
>
> "Applying the ordinary meaning of general practitioner is one who does not limit his practice to any particular branch of medicine, Dr. Gallagher clearly does not satisfy the requirements of MCL 600.2169 and, therefore, would not be qualified to offer expert testimony on the standard of practice of a general practitioner such as defendant Dr. Flood. **Because Dr. Gallagher is precluded by MCL 600.2169 from testifying regarding defendant's standard of practice, there is no genuine dispute that the affidavit of merit attached to plaintiff's complaint does not comply with**

the requirements of MCL 600.2912d(1), and defendants were entitled to judgment as a matter of law." (Emphasis added.)

As stated above, Dr. Nearing is a specialist who practices in the specialty of endodontics. As noted on his own documents, and admitted in his deposition, his practice is limited to endodontics. Dr. Simmons is a general dentist who does not specialize in any specific branch of dentistry. While he may perform root canals, he does not specialize in them. Given these undisputed facts, Dr. Nearing is not, and never was, qualified to offer expert testimony against Dr. Simmons and the Affidavit of Merit he executed was invalid, a nullity, and insufficient to commence Plaintiff/Appellee's action. Plaintiff/Appellee's action was barred on September 16, 2001, as a matter of law, under MCLA 600.5805(4) and Defendant/Appellant should have been granted summary disposition and dismissal of Plaintiff/Appellee's Complaint with prejudice.

Defendant/Appellant acknowledges the recent Court of Appeals decision in *Kirkaldy v Rim*, 251 Mich App 570; 651 NW2d 80 (June 4, 2002). In that case, the Court of Appeals specifically declined to enter any decision as to whether or not the filing of a defective affidavit tolls the statute of limitations. As the court in *Kirkaldy*, *supra*, pointed out, because the issue had never been raised in the statements of questions presented nor raised by the plaintiff/appellee in the cross-appeal, "We need not address this issue."

However, the court in *Kirkaldy*, *supra*, specifically found that an affidavit signed by a specialist in a case involving a general practitioner **is defective and does not comport** with MCL 600.2912d. In *Kirkaldy*, *supra*, the court went on to find that a neurosurgeon was not qualified under 600.2169 to testify against a neurologist.

Defendant/Appellant would respectfully contend that the Court of Appeals was not correct in stating, in *Kirkaldy*, *supra*, that the courts had never ruled on the issue of whether a

defective affidavit of merit would toll the statute of limitations or not. In *Roberts* v *Mecosta County General Hospital*, 466 Mich 57; 642 NW2d 663 (2002), although that case dealt with a defective notice of intent as opposed to a defective affidavit of merit, this Supreme Court's ruling was completely on point. This court ruled that the duty of the courts of this state is to apply the actual terms of an unambiguous statute. The court went on to find that the terms of MCLA 600.2912b were unambiguous and that the statute of limitations **cannot** be tolled under MCLA 600.5856(d) unless the notice of intent is **fully in compliance** with **all** of the provisions of MCLA 600.2912b. Applying the same standard, the statute of limitations applying to this case cannot be tolled unless the Affidavit of Merit is **fully in compliance** with **all** of the provisions of MCLA 600.2169(1)(c) and MCLA 600.2912d(1). As pointed out before, Plaintiff/Appellee's Affidavit of Merit is not in compliance with MCLA 600.2169(1)(c) because it was signed by a specialist, while the Defendant/Appellant is a general dentist. The statute clearly and unambiguously states that the affidavit **must** be signed by a general practitioner who was engaged in an active clinical practice for at least one year prior to the occurrence that forms the basis of the plaintiff/appellee's complaint. The word "**must**" is unambiguous. It denotes a mandatory rather than a discretionary action. As the Supreme Court in *Roberts*, *supra*, stated at page 66 of its Opinion, where the language is unambiguous: "We must enforce its plain language... A clear and unambiguous statute requires **full compliance** with its provisions as written... The rule of the judiciary is not to engage in legislation." (Emphasis added.)

Furthermore, under MCLA 600.2912d(1) the plaintiff's attorney **shall** file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169. This statute is unambiguous as well. Plaintiff/Appellee's attorney did not comply with the clear terms

of this statute where he filed an affidavit signed by an expert he could not reasonably believe met the requirements for an expert under section 2169.

In this case, the trial court and the Court of Appeals erred by ignoring the clear and unambiguous language of the statute. The Affidavit in this case was not executed by a properly qualified general dentist. It was executed by a specialist. As a result, it does not **in any way comply** with the clear and unambiguous language of MCLA 600.2169. Nor does it comply with the clear requirements of MCLA 600.212d(1). The statute of limitations could not be tolled, as the filing of a complaint without an actual, valid affidavit of merit that **fully complies** with the statutes does not, and cannot, commence an action **for any purpose**. *Roberts, supra.*

Defendant/Appellant would point out that a default could not be entered against the Defendant/Appellant in this case where the action never commenced, given that Plaintiff/Appellee's Affidavit does not in any way comply with the statutes. Where an action has not been commenced, it is common sense that a default cannot be entered. This is particularly true where the statute of limitations expired on September 16, 2001, before Defendant was required to answer the Complaint on September 28, 2001. The default was not entered until October 4, 2001.

Defendant/Appellant would direct attention to the published Court of Appeals decision of *Nippa* v *Bottsford General Hospital*, 251 Mich App 664; 651 NW2d 103 (2002). In that case, the plaintiff failed to file an affidavit of merit by a board certified expert. The plaintiff argued that because he was only suing the hospital, and had not named the three doctors who had allegedly committed malpractice, and who were all board certified, he was not required to do so. The court disagreed and found that the trial court's decision dismissing plaintiff's complaint was proper. The Court of Appeals discussed the legislative intent behind MCL 600.2912d(1) and MCL 600.2169 in great detail.

In *Mouradian v Goldberg*, 256 Mich App 566; 664 NW2d 805 (2002), the Court of Appeals noted, in Footnote No. 5, that it respectfully disagreed with dicta in the *Holmes*, *supra*, decision, and declined to apply it, finding that an affidavit of merit failing to comply with the requirements imposed by MCL 600.2912d(1)(a)-(d) when filed together with a complaint, was not sufficient to commence a medical malpractice action. The court, in *Mouradian*, *supra*, also found that the plaintiff's affidavit of merit as to one of the two surgeries was grossly nonconforming and that the statute of limitations as to the prior surgery had expired before the grossly nonconforming affidavit of merit had been filed.

In *Geralds v Munson Healthcare*, 259 MA 222, 239-240; 673 NW2d 792 (2003) the Court of Appeals specifically found that an affidavit of merit that is grossly nonconforming to the statutes requirements is not an affidavit that will support the filing of a complaint or commencement of an action.

In *Wise v Shink, et al*, an unpublished Court of Appeals Opinion issued June 24, 2003, Docket No. 235279, and attached as **Exhibit E**, the plaintiff filed her complaint with an affidavit of merit by an orthopedic surgeon. However, the defendants were general practitioners in the field of podiatry. The Court of Appeals noted that the plain and unambiguous language of MCL 600.2169(1)(c) "**requires a general practitioner to testify as an expert witness against a defendant who is a general practitioner. There is nothing in the language of the statute that would make the exception that plaintiff offers." (Emphasis added)** In applying *Wise*, *supra*, to this case there is no exception that will allow the Plaintiff/Appellee to file, or rely on, an affidavit of merit by a specialist in a case against a general practitioner. As a result, Plaintiff/Appellee's action was not commenced and the statute of limitations bars it at this time.

In *Glancy v Steinberg, et al,* an unpublished Court of Appeals Opinion issued June 24, 2004, Docket No. 237963, attached as **Exhibit F**, the plaintiff filed affidavits of merit

by two experts which had not been properly notarized. The plaintiff argued she had substantially complied with the affidavit of merit requirements. The Court of Appeals rejected that argument and found that the plaintiff had failed to file a valid affidavit of merit and, as a result, had failed to commence a medical malpractice action against the defendants. The Court of Appeals went on to find that plaintiff's complaint was null and void as a matter of law and that the trial court should have granted defendants' motion for summary disposition. The same is true in this case.

In *Kyser v Hillsdale Community Health Center, et al*, an unpublished Court of Appeals Opinion issued July 22, 2003, Docket No. 237060, attached as **Exhibit G,** the defendant was board certified in internal medicine and plaintiff's expert was board certified in emergency room medicine. The Court of Appeals found that plaintiff's expert's affidavit of merit was nonconforming because he was not board certified in internal medicine, nor did he spend a majority of his professional time practicing or teaching internal medicine. The court stated:

> "The statute provides that an expert must specialize 'in the same specialty' as the defendant doctor, not that he must specialize in the area of medicine being practiced by the defendant doctor at the time the cause of action arose. *Decker v Flood*, 248 Mich App 75, 83-84; 638 NW2d 163 (2002). Therefore, we reverse the trial court's ruling that the affidavit of merit was sufficient."

In *Gregory v Knollwood Dental Care, P.C., et al*, an unpublished Court of Appeals Opinion, Docket No. 240918, issued September 18, 2003, attached as **Exhibit H**, the Court of Appeals again affirmed the trial court's grant of summary disposition. The case is factually analogous because the defendant was a periodontist, but plaintiff's expert was a specialist in prosthodontics. The Court of Appeals noted that MCL 600.2912d requires a plaintiff in a medical malpractice action to file, with the complaint, an affidavit of merit signed by a health professional which the plaintiff's attorney reasonably believes meets the requirements for an expert witness under MCL 600.2169. The Court of Appeals went on to state:

> "An expert witness who is a specialist may not testify on the standard of practice of a general practitioner. *Decker v Flood*, 248 Mich App 75; 638 NW2d 163 (2001). The mere tendering of a complaint without **the required** affidavit of merit is insufficient to commence the lawsuit and therefore toll the periods of limitations. *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000)
>
> ...
>
> Since plaintiff's expert is precluded from testifying regarding defendant's standard of practice, there is no genuine dispute that the affidavit of merit attached to plaintiff's complaint does not comply with the requirements of MCL 600.2912d(1), and defendant is entitled to judgment as a matter of law. See *Decker* at 167 and *Scarsella*." (Emphasis added.)

In *McConnell v William Beaumont Hospital, et al*, an unpublished Court of Appeals Opinion, Docket No. 241672, issued December 2, 2003, attached as **Exhibit I**, the Court of Appeals again affirmed the trial court's grant of summary disposition to the defendant doctors. There, the defendant was board certified in a specialty of obstetrics and gynecology, but the plaintiff filed an affidavit of merit executed by a doctor who was a board certified surgeon. The trial court ruled the affidavit of merit was nonconforming and dismissed the complaint. The Court of Appeals in *McConnell*, *supra*, citing to *Kirkaldy*, *supra*, noted that if a complaint is accompanied by a nonconforming affidavit of merit, dismissal is appropriate. The Court of Appeals found that the affidavit was plainly nonconforming and that the evidence presented to the trial court was sufficient to establish that plaintiff's counsel's belief that the expert was appropriate was not reasonable.

Where the affidavit of merit is invalid and a nullity, plaintiff/appellee's complaint was not properly filed, plaintiff/appellee's action was not commenced, plaintiff/appellee's action is barred by the statute of limitations and must be dismissed as a matter of law. *Scarsella* v *Pollack*, 461 Mich 547, 550; 607 NW2d 711 (2000); *Dorris* v *Detroit Osteopathic Hospital*, 460 Mich 26, 43-47; 594 NW2d 455 (1999); *VandenBerg* v *VandenBerg*, 231 Mich App 497, 502; 586 NW2d 570 (1998); *Holmes* v *Michigan Capital Medical Center*, 242 Mich App 703, 620 NW2d 319 (2000);

VandenBerg v *VandenBerg*, 253 Mich App 658; 660 NW2d 341 (2002). A default cannot be entered where an action has not been commenced.

As the Court of Appeals makes clear in *Nippa*, *supra*, the **only** appropriate action for the trial court to take where an improper, invalid, and deficient affidavit of merit has been filed, whether because it is not notarized or because the person signing it was not qualified is dismissal of the plaintiff/appellee's claim. Here, Plaintiff/Appellee's action was never commenced, the statute of limitations was not tolled, expired before Defendant was required to answer, and the trial court erred by not dismissing Plaintiff/Appellee's Complaint with prejudice and erred by entering a default in an action that had not been commenced.

In summary, the opinions from the Michigan Supreme Court and Court of Appeals have uniformly held that an affidavit of merit that is signed by a person not qualified to sign it, under the terms of MCLA 600.2169, is not a valid affidavit, and the filing of a complaint with such a grossly nonconforming "affidavit" does not commence an action. Since an action in such a case is not commenced, the statute of limitations is not tolled. If the action is not commenced, a defendant does not, and cannot, have a duty to respond to the complaint and a default cannot be entered! If, under the clear and unambiguous terms of the statutes, the affidavit must be treated as if it did not exist for statute of limitations purposes, so must it be treated for purposes of a default. The Court of Appeals decision is inconsistent, and conflicts with other decisions of the Court Of Appeals and this Court, and its decision must be reversed.

II. THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN AFFIRMING THE TRIAL COURT'S REINSTATEMENT OF A DEFAULT AGAINST DEFENDANT/APPELLANT WHERE PLAINTIFF'S ACTION HAD NEVER BEEN COMMENCED AS A MATTER OF LAW AND DEFENDANT/APPELLANT HAD NO DUTY TO ANSWER AND WHERE THE STATUTE OF LIMITATIONS BARRED PLAINTIFF/APPELLEE'S ACTION BEFORE DEFENDANT/APPELLANT WAS REQUIRED TO ANSWER AND BEFORE THE ORIGINAL DEFAULT WAS ENTERED.

A. STANDARD OF REVIEW

An appeal of the trial court's reinstatement of the default against Defendant/Appellant is reviewed for abuse of the trial court's discretion. *Hart v American Causality Insurance Co.* 219 Mich App 62, 66; 555 NW2d 720 (1996).

B. DISCUSSION

As noted earlier, a review of the Court of Appeals decision in the case of *Nippa, supra*, demonstrates that the Michigan Appellate and Supreme Court have continued to uphold the clear and unambiguous language of MCL 600.2912 and MCL 600.2169. The panel in *Nippa, supra*, also cited to *Tate* v *Detroit Receiving Hospital*, 429 Mich App 212, 218-219; 642 NW2d 346 (2002), in support of its decision that plaintiff's expert in *Nippa, supra*, was deficient because he was not board certified. As the *Tate* Court observed:

> "Section 2169 **requires an expert witness to possess the same specialty as that engaged in by the Defendant/Appellant physician during the course of the alleged malpractice.** *Tate, supra* at 220" (Emphasis added).

The court in *Nippa, supra*, also referred to *Kowalski v Fiutowski,* 247 Mich App 156, 163; 635 NW2d 502 (2001). The court in *Kowalski, supra,* had observed that pursuant to MCR 2.112 and MCR 2.603, both the plaintiff and defendant's affidavits are part of the pleadings. In that case, where the defendant had failed to file a proper affidavit of meritorious defense, the court held that such action resulted in a **failure to plead**. In this case, Plaintiff/Appellee's failure to file a valid affidavit of merit executed by a properly qualified expert, to wit: a general dentist, was a

failure to plead. Plaintiff/Appellee failed to commence the action and as the action has never been commenced, a default cannot properly be entered.

In *White* v *Busuito*, 230 Mich App 71; 583 NW2d 499 (1998), a plastic surgeon moved to set aside a default and a $750,000.00 default judgment entered against him in the plaintiff's medical malpractice action. The trial court denied the surgeon's motion, and he appealed as of right. The Court of Appeals held that because the plaintiff failed to file either a security for costs or an affidavit of meritorious claim, the physician had no obligation to answer plaintiff's complaint. In doing so, the Court of Appeals in *White, supra* stated at page 72:

> "While defendant asserts several alternative bases for reversal, we find one to be dispositive. We concluded that, because plaintiff failed to file either security for costs or an affidavit of meritorious claim **as required by MCL §600.2912d; MSA §27A.2912(4), Defendant had no obligation to answer plaintiff's complaint**. We therefore vacate the default and default judgment entered against defendant and remand for further proceedings. (Emphasis added.)

Again, in *White*, *supra*, at pages 74-76 of the Opinion, the Court of Appeals stated:

> On appeal, defendant argues that the entry of a default and default judgment was improper because plaintiff's failure to file either security for costs or an affidavit of meritorious claim as required by MCL §600.2912d; MSA §27A.2912(4) relieved defendant of his obligation under MCL §600.2912e(1); MSA §27A.2912(5)(1) to serve and file an answer to plaintiff's complaint. **We agree. This Court construes statutory provisions according to their plain terms.** *Grand Traverse County* v *Michigan*, 450 Mich 457, 464; 538 NW2d 1 (1995). **If the meaning of the statute is clear and unambiguous, there is no room for judicial construction or interpretation.** *Coleman* v *Gurwin*, 443 Mich 59, 65; 503 NW2d 435 (1993).
>
> Given the language contained in both §2912e(1) and MCR 2.108(A)(6), its plain and ordinary meaning, we conclude that a plaintiff's filing of security for costs or an affidavit of meritorious claim **is an absolute prerequisite** to the defendant's obligation to answer or otherwise defend the action.

> Here, it is undisputed that plaintiff never filed security for costs or an affidavit of merit as required by MCLA §600.2912d; MSA §27A.2912(4). Defendant correctly argued to the trial court that the default and resulting default judgment should not have been entered, because his answer was not yet due. The relevant **21-day period for filing defendant's answer never began to run**, because neither security for costs nor an affidavit of merit was ever filed. Consequently, the May 15, 1995, default and June 2, 1995, default judgment entered as a result of Defendant's failure to answer **were void *ab initio* and must be vacated**. See *BCS Life Ins. Co.* v *Commissioner of Insurance*, 152 Mich App 360, 371-372; 393 NW2d 636 (1986)." (Emphasis added.)

The Court of Appeals' decision in *White, supra*, cannot reasonably be distinguished from the instant case. While the Plaintiff/Appellee did file a purported Affidavit of Merit in this case, it did not comply with the clear and unambiguous language of MCL 600.2169 or MCL 600.2912d(1). It had been executed by a person who was clearly not qualified under MCL 600.2169. As in *Decker, supra* plaintiff's attorney did not have a reasonable belief that the expert was properly qualified and therefore did not comply with MCLA 600.2912d(1). Under these facts, it must be viewed as if no affidavit had been filed. Defendant/Appellant had no obligation to answer Plaintiff/Appellee's Complaint, particularly where the statute of limitations expired on September 16, 2001, 12 days before Defendant/Appellant would have been required to answer if an action had been commenced, and the default initially entered was void *ab initio*, and should not have been reinstated because Defendant/Appellant had no duty to answer. The Michigan Supreme Court denied a further appeal in *White* v *Busuito*, 459 Mich 978, 593 NW2d 556 (1999).

Defendant/Appellant also cites to an unpublished Opinion of the Michigan Court of Appeals, *Glancy* v *St. Joseph Mercy Hospital*, 2000 WL 33534654 (Mich App) (2000) decided February 1, 2000. In that case, the plaintiff/appellee filed a complaint before the expiration of the notice period set out in MCL 600.2912b(8); MSA 27A.2912(2)(8). The first complaint was

filed with an affidavit of merit. However, because it was filed before the expiration of the notice period, the action was dismissed without prejudice. Plaintiff/Appellee subsequently filed a second complaint, but at that time failed to attach a valid affidavit of merit. Defendant/Appellant moved for summary disposition and argued that the second complaint was ineffective to further toll the statute of limitations and that plaintiff/appellee's claim was therefore barred because plaintiff/appellee failed to file a complaint with an affidavit of merit before the limitations period had expired. Plaintiff/Appellee acknowledged that the affidavit of merit was not filed with the second complaint, but argued that the case should not be dismissed because an affidavit of merit was filed in the first action. The trial court disagreed, and concluded that the requirement was not complied with, rendering the second complaint invalid and ineffective to toll the statute of limitations. Because the limitations period had by then expired, the court granted defendant/appellant's motion for summary disposition and dismissed plaintiff/appellee's action with prejudice. In affirming the trial court's decision, the Court of Appeals stated:

> "Generally, a civil action is commenced and the statute of limitations is tolled when a complaint is filed. MCL 600.5856(a); MSA 27A.5856(A). However, in a medical malpractice action, the Plaintiff/Appellee must file an affidavit of merit with the complaint. MCL 600.2912d(1); MSA 27A.2912(4)(1)... This Court has held that 'for statute of limitations purposes in a medical malpractice case, the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit." *Scarsella* v *Pollack*, 232 Mich App 61, 64; 591 NW2d 257 (1998). Here, **because Plaintiff/Appellee's complaint was filed without the required affidavit of merit, the filing of the complaint was insufficient to commence the lawsuit and toll the statute of limitations. Therefore, the trial court correctly granted Defendant/Appellant's motion for summary disposition because the statute of limitations barred Plaintiff/Appellee's action...** The holding from *Scarsella* plainly requires us to hold that **the filing of Plaintiff/Appellee's complaint without the required affidavit of merit did not toll the statute of limitations**. Accordingly, the trial court did not err in granting Defendant/Appellant's motion for summary disposition

and dismissing Plaintiff/Appellee's action with prejudice." (Emphasis added.)

The Court of Appeals attempted to distinguish *White v Busuito, supra* on the basis that in *White* no affidavit was filed, whereas in this case an affidavit, while defective, and filed by an attorney who did not have a reasonable belief the affiant was properly qualified, had been filed. As noted above, that is not a rational distinction. A grossly nonconforming affidavit filed by an attorney without the necessary reasonable belief, is and must be, considered as void ab initio and treated as if it had never existed. In this case it is clear that the statutory requirements were not met. The fact that *Decker v Flood, supra* was not decided until October 26, 2001 is irrelevant. As the Court of Appeals noted in its footnote number eight, the trial court concluded, based on the stipulated facts, and following an evidentiary hearing, that Plaintiff/Appellee's counsel's belief that Dr. Nearing was properly qualified was not reasonable in light of the stipulated facts concerning the extent of Plaintiff/Appellee's counsel's investigation of the Defendant/Appellant's credentials, and Dr. Nearing's credentials, before filing the lawsuit. Dr. Nearing was an endodontist. His letterhead, his curriculum vita, and his discussions with Plaintiff/Appellee's counsel, prior to the filing of the lawsuit, had established that he was an endodontist, a specialist. Yet the Defendant/Appellant was a general dentist and that was known to Plaintiff/Appellee's counsel at all times. The language of MCLA 600.2169(1)(c) is clear and unambiguous as the Court of Appeals noted in *Decker v Flood, supra.* It is not a valid distinction to argue that in this case Plaintiff/Appellee should be excused from having to file a proper affidavit because *Decker v Flood, supra* had not yet been decided, when the Court of Appeals in *Decker v Flood, supra*, ruled otherwise and dismissed the plaintiff's complaint in that case for failing to file an affidavit by a general dentist rather than an endodontist.

The Court of Appeals goes on to state in its opinion that if they held that a duty to answer the Complaint did not arise in this case it would open the flood gates to all manner of retrospective claims that a defendant had no obligation to respond to a summons and complaint. However, the only cases in which such claims could be made are cases where malpractice complaints had been filed that do not comply with the clear and unambiguous language of the statutes and where this court, and the Court of Appeals, in numerous prior decisions has specifically found that an action has not been commenced.

The Court of Appeals then goes on to argue that a defendant could knowingly foster the running of the limitations period by ignoring the lawsuit and then simply by-pass the default by attacking the affidavit of merit, depriving the plaintiff of the legitimate opportunity to cure a defect if attacked in an answer and/or affirmative defenses. However, this court in *Burton v Reed City Hospital Corporation*, 471 Mich 745, 691 NW2d 424 (2005) held that the defendant hospital and physicians did not waive their statute of limitation defense by not filing a motion for summary disposition before the statute ran. In other words, a defendant is not obligated under this court's prior decisions, to advise the plaintiff of the deficiency in their pleadings.

Moreover, in this case there is absolutely no rationale for upholding the entry of a default against this Defendant/Appellant. Plaintiff/Appelle's Complaint was filed on August 28, 2001. It was served on the Defendant/Appellant on September 7, 2001. It was filed with a grossly nonconforming Affidavit by an attorney who did not have the necessary reasonable belief that the expert was properly qualified. As a result, under the line of cases relating to the statute of limitations, the action was not commenced, and the statute of limitations was not tolled. As of August 28, 2001 there were 18 days left before the statute would run. The statute ran on September 16, 2001, nine days after the invalid Complaint was served. Under the court rules a defendant has 21 days within which to answer the complaint before a default can be entered. In

this case the statute of limitations ran 12 days before Defendant/Appellant was obligated to answer the Complaint. Under those undisputed facts a default should not have been entered against this Defendant/Appellant on October 4, 2001. More importantly, under those undisputed facts, the trial court clearly abused its discretion by reinstating the default that should never have been entered in the first place in October of 2002, and by denying Defendant/Appellant's Motion for Reconsideration in July of 2003.

In summary, the trial court abused its discretion by entering a default against this Defendant/Appellant in a case that had never been commenced, and in a case where the statute of limitations had expired on September 16, 2001, 12 days before the Defendant/Appellant was obligated to file an answer to the Complaint. The Court of Appeals clearly erred by affirming the trial court's reinstatement of the default under these clear and undisputed facts, and under the clear and unambiguous language of MCL 600.2169 and MCL 600.2912d(1).

RELIEF REQUESTED

Defendant/Appellant respectfully requests that this Honorable Court reverse the Court of Appeals' affirmance of the trial court's denial of Defendant/Appellant's Motion for Summary Disposition and its Reinstatement of Default, and remand this matter to the trial court for entry of an order setting aside the judgment entered on August 12, 2003 and for an entry of dismissal with prejudice.

Dated: 8/4/05

BENSINGER, COTANT & MENKES, P.C.

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